No. 22,280

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PUBLIX WAREHOUSE, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON PETITION TO REVIEW AND SET ASIDE AND ON CROSS-PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of Publix Warehouse, Inc. (hereinafter petitioner or Company) to review and set aside an order of the National Labor Relations Board issued against petitioner on October 6, 1967, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*). In its answer, the Board has cross-petitioned for enforcement of its order. The Board's Decision and Order (R. 13-21,

26-27)[1] are reported at 167 NLRB No. 95. This Court has jurisdiction over the proceeding under Sections 10(e) and 10(f) of the Act, the unfair labor practices having occurred at Anchorage, Alaska.

COUNTERSTATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board, rejecting the Company's contrary contention, determined that the Company is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and that the purposes of the Act will be effectuated by asserting jurisdiction over its operations.

The Board also found that the Company violated Section 8(a)(1) of the Act by interrogating employees about their feelings toward a union, by threatening employees with loss of employment and promising and granting wage increases in order to discourage their interest in the Union, and by imposing onerous working conditions on two employees because they supported the Union. The Board further found that the Company violated Section 8(a)(3) and (1) of the Act by reducing the weekly earnings of its employees and laying off one employee in order to discourage membership in the Union. Finally, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by instituting changes in wages and hours without giving the Union an opportunity to bargain about such changes. The facts on which the Board's findings and jurisdictional determination are based are summarized below.

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[1] References to the pleadings reproduced as "Volume I, Pleadings" are designated "R." References to the stenographic transcript of the hearing reproduced pursuant to Court Rule 10 are designated "Tr." References to the General Counsel's exhibits and to petitioner's exhibits are designated "G.C. Exh." and "P. Exh.", respectively. Whenever a semicolon appears, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

A. The Board's jurisdiction: the nature of the petitioner's business

The Company, an Alaska corporation, operates a warehouse in Anchorage where it receives merchandise, primarily foodstuffs, which generally arrive in railroad cars transported by ship from Seattle, Washington. The Company unloads the material; then, either immediately upon arrival or after a period of storage, the Company reloads the merchandise in trucks and distributes it to consignees in Alaska (R.13; Tr. 8-12, 17). The Company's principal customer is Superior Shippers Association, a non-profit shippers' cooperative which paid the Company $118,166.91 for unloading and delivery services in 1966. All of the shipments handled for Superior were from out of State. An additional $34,686.69 was received by petitioner from other customers, of which about two thirds came from interstate shipments (R. 14; Tr. 74, 78, 89-90, 97).

B. The unfair labor practices

During the early part of May 1966, the Union[2] began to organize petitioner's warehouse employees, approximately ten in number, after some of them had evinced an interest in having the Union as their bargaining representative (R. 14; Tr. 15, 32). On May 16, 1966, the Union requested recognition from the Company by registered letter sent to Francis Moesh, the Company's president. The request went unanswered (R. 14; Tr. 32-33). However, on May 28, Moesh took employee David Schacht out for coffee and told him that "in no way he [Moesh] wanted to go union, that he would push it to an election, [and] that he had to have someone on his side. . . ." Moesh said that he would raise Schacht's wages from $190.00 to $230.00 per week effective immediately, and asked Schacht what he thought

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[2]Teamsters, Chauffeurs, and Helpers Local 959, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent.

of the Union. Schacht was non-committal, saying only that he would "think it over," and accepted the proffered increase (R. 14; Tr. 38-41).

In June 1966, Dwane Phillips was hired by petitioner. During his employment interview, Phillips was asked by Company president Moesh "how [Phillips] felt about unions." Phillips replied "it didn't make any difference one way or the other." Moesh then said that "he paid union wages there but he did not want to go union" (R. 15; Tr. 61-62). About a month and a half later, around the middle of August, Moesh, Schacht and Phillips went to a local tavern after work. After Schacht left, Phillips told Moesh that the latter "would make money even if he was to go union." Moesh replied, however, that "he absolutely didn't want anything to do with the Union affiliation," and added that "he would close the warehouse down before he would go union" (R.15; Tr. 63-64). Approximately a week later, Moesh again discussed the Union with Phillips and said, "He would absolutely not negotiate a union contract, he would close down first . . . and he also mentioned he couldn't afford to go union." Moesh further indicated he was "real disgusted" because employees Schacht and Fred Benton "went toward the union way of thinking." During one of these two discussions, Phillips was given a wage increase from $170 to $180 per week by Moesh (R. 15; Tr. 64-65).

Walter J. Barth applied for work at the warehouse in the late summer of 1966. He was interviewed by President Moesh, who asked him how he felt about the Union. Barth replied that "the union had good and bad points . . . [as did] non-union. . . ." (R. 14; Tr. 46-47). Moesh hired Barth, who started working part-time in the evenings because he did not wish to quit his previous job without giving two weeks notice to his employer. Barth began working full time on September 10 (R. 14-15; Tr. 50).

The Union petitioned the Board on August 8, 1966 for a representation election among petitioner's employees, and the election was scheduled for September 15 (R.14; Tr. 33). On September 14, President Moesh approached Barth in the ware-

house and told him that "if the union came in . . . he wouldn't be able to keep us working year around. . . . That he would have to start contracting the work out to Sea-Land . . . and that would mean that [Barth] would be out of some work" (R. 15; Tr. 47). The same day Dwane Phillips separately urged Lance Brewster and Barth "to vote on the side of management"[3] (R. 15; Tr. 65-66). Later in the day, Phillips and Brewster again discussed the Union, and Brewster said, referring to his position favoring the Union, that "[i]f Jake Moesh came up to me and paid me $200 a week, I would probably go the other way" (R. 15; Tr. 56, 66-67). Phillips reported this conversation with Brewster to Moesh, who thereafter sought Brewster out (R. 15; Tr. 56, 67). The two men went to the "coffee room" in the warehouse, where Moesh said that "if the union came in he would have to resort to sea land trailers to ship his freight and he could not afford the union, he couldn't afford to have anyone tell him how to run his business." Moesh also asked Brewster how long he had been employed at the warehouse, and Brewster answered eleven weeks. Moesh then said, "I will raise your pay to $200 a week and after you have been here two more months I will make it $230 a week." When Moesh asked him what he "would do" with respect to the Union, Brewster replied that he would "think about it." Moesh also inquired of Brewster what Barth "would do", and Brewster answered that "he would probably do what I do." Moesh then indicated to Brewster that he would raise Barth's pay to $200 after Barth had been employed eleven weeks, and after an additional two months Barth would "be raised accordingly" (R. 15; Tr. 56-57).

Notwithstanding the efforts of President Moesh, the Union won the election and was certified as collective bargaining

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[3] Although Phillips had previously been a strong supporter of the Union and had even solicited a Union authorization card from Brewster, he had a change of heart and "began to sympathize with [Moesh's] point of view" as a result of his discussions with Moesh (R. 15; Tr. 55, 65-66).

representative on September 23 (R. 14; Tr. 21-22). After the election results became known on September 15, employee Phillips apologized to Moesh and to Dean Deegan, petitioner's Secretary-Treasurer, "for not being able to talk Brewster and Barth into voting their way. . . ." Moesh replied that he was "highly disgusted because he lost the election" and that "there would be a change in the employees generally." Thus, Moesh said, Barth would be laid off in the hope that he "would get discouraged and find other employment;" other employees, particularly Schacht and Benton, "would be disgusted" and would quit "when they saw their checks," which would be cut by as much as fifty dollars a week (R. 15, 16-17; Tr. 67-70).

On the Saturday following the election, Moesh told Barth that he was laid off because there was insufficient work on hand, but that Barth should check in the following week. Barth did so, but was again told he was not needed. He was finally recalled on October 5, two and a half weeks after the initial layoff. When Barth returned, however, he found that Phillips, who now occupied the position of "pusher" or lead man, was "unfriendly". As Barth further described his situation, Phillips "kind of rode me and tried to make me quit" (R. 15; Tr. 48-49, 51-52). Brewster, though he was not laid off, also found that his relations with Phillips after the election had become unpleasant because Phillips "seemed like he was always mad or trying . . . to get me to quit or leave" (R. 15; Tr. 58). According to Phillips, he had been instructed by Moesh to "put enough pressure" on Brewster and Barth to induce them to leave, and thus he "rode Brewster and Barth so damned hard that under ordinary circumstances ordinary men would quit." (R. 15; Tr. 69-70, 71-72).

Prior to the election, the warehouse employees worked 47½ hours per week. After the election, however, their hours were reduced to 40 and their earnings lessened accordingly. Schacht's pay, for example, dropped from $230 to $179.60; Brewster's and Barth's from $170 to $132.80 (R. 15-16; Tr. 26-27, 79, 92-93; G.C. Exh. 4, 5, 6). The Union was not con-

sulted in advance about the reduction in hours and wages, even though the Union's business agent had asked Moesh immediately after the election ballots were counted when it would be possible to start negotiating a contract (R. 16; Tr. 34-35).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing, the Board concluded, in agreement with the Trial Examiner, that the Company was engaged in commerce or in an activity affecting commerce within the meaning of Sections 2(6) and (7) of the Act, and that assertion of jurisdiction over it was warranted (R. 14). The Board also concluded that the Company violated Section 8(a)(1) of the Act by interrogating employees during job interviews concerning their Union sentiments, threatening to close the warehouse or to subcontract work should the employees vote in favor of the Union, promising and granting wage increases in an attempt to dilute interest in the Union and to recruit opposition to the Union, and imposing onerous work conditions upon employees Barth and Brewster because they supported the Union; violated Section 8(a)(3) of the Act by laying off Barth and reducing the hours and the weekly earnings of the warehouse employees; and violated Section 8(a)(5) of the Act by instituting wage and hour changes affecting employees in the appropriate unit without giving the Union the opportunity to bargain about such changes (R. 19).

To remedy these unfair labor practices, the Board ordered the Company to cease and desist from the unlawful conduct found, to bargain with the Union upon request, and to post appropriate notices. Additionally, the Board's order requires the Company to make Barth and other employees whole for any loss of earnings attributed to their discriminatory treatment by the Company (R. 19-20).

ARGUMENT

I.

THE BOARD PROPERLY ASSERTED JURISDICTION OVER THE COMPANY'S BUSINESS

A. The existence of statutory jurisdiction is plain

As shown in the Counterstatement, the Company receives goods directly from out-of-state, unloads them, in some cases stores them for a period of time, and then reloads them on trucks and distributes them to their consignees within the state. Without question, then, the Company's operations place it directly in the stream of interstate commerce, and that commerce would obviously be affected, within the meaning of the statute,[4] in the event the Company's business were disrupted by a labor dispute arising from unfair labor practices committed by the Company. Accordingly, the Company meets the statutory test for invoking the Board's jurisdiction. *N.L.R.B. v. Fainblatt*, 306 U.S. 601, 607. And see *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675, 684-685; *N.L.R.B. v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226-227; *N.L.R.B. v. O'Keeffe Electric Co.*, __ F.2d __, 67 LRRM 2833 (C.A. 9); *N.L.R.B. v. Stoller*, 207 F.2d 305, 307 (C.A. 9), cert. denied, 347 U.S. 919; *N.L.R.B. v. Townsend*, 185 F.2d 378, 383 (C.A. 9), cert. denied, 341 U.S. 909.

The Company apparently does not quarrel with this fact (Br. p. 7), but argues instead that the Board, in asserting jurisdiction here, violated its own self-imposed jurisdictional

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[4]The Act states that the jurisdiction of the Board extends to any person ". . . engaging in any unfair labor practice . . . affecting commerce." Section 10(a), 29 U.S.C. Section 160 (a), as those terms are defined by Section 2(6) and (7) of the Act, 29 U.S.C. Section 152 (6) and (7).

standards. As this Court has pointed out, however, in *N.L.R.B. v. Carroll-Naslund Disposal, Inc.*, 359 F.2d 779, 780 (C.A. 9), "[i]t is settled law that the extent to which the Board chooses to exercise its statutory jurisdiction is a matter of administrative policy within the Board's discretion, . . . and is not a question for the courts, . . . in the absence of extraordinary circumstances such as unjust discrimination. . . ." See also *N.L.R.B. v. W.B. Jones Lumber Co.*, 245 F.2d 388, 390-391 (C.A. 9). We show below that the Board here reasonably applied its own jurisdictional standards and that no extraordinary circumstances are present warranting reversal.

B. The Company meets the Board's self-imposed jurisdictional standards

As a matter of administrative policy the Board has established certain jurisdictional standards, expressed in terms of annual dollar minimums, to determine under what conditions it will assert its jurisdiction over various types of businesses. *N.L.R.B. v. W.B. Jones Lumber Co., supra,* 245 F.2d at 391. Thus, in *HPO Service, Inc.*, 122 NLRB 394, 395, the Board announced that it would:

> assert jurisdiction over all passenger and freight transportation enterprises engaged in the furnishing of interstate transportation services, and all transportation and other enterprises which function as essential links in the transportation of passengers or commodidities in interstate commerce, which derive at least $50,000 gross revenues per annum from such operations, or which perform services valued at $50,000 or more per annum for enterprises as to which the Board would assert jurisdiction under any of its jurisdictional standards.[5]

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[5] See *N.L.R.B. v. Jordan Bus Co.*, 380 F.2d 219, 221 (C.A. 10).

As examples of what it considers to be "essential links," the Board referred to the enterprises involved in such cases as *Breeding Transfer Co.*, 110 NLRB 493, in which the employer, *inter alia*, performed local pickup and delivery service for goods coming to it from interstate commerce via interstate common carriers (railroads); *United Warehouse and Terminal Corporation*, 112 NLRB 959, 960, where the employer stored goods coming to it from out-of-state and subsequently released them for further shipment out-of-state; and *Kenedy Compress Company*, 114 NLRB 634, 635, in which the employer stored cotton apparently received from local sources, then shipped it out-of-state. See also, *Dallas Transfer & Terminal Warehouse Company*, 114 NLRB 18, 19, a case almost identical to the instant one, where the employer received goods from out-of-state, stored them and then delivered them locally.

From the foregoing, it is clear that the Board has consistently viewed enterprises such as that of the Company here as "essential links" in the interstate transportation of commodities. Further, the first alternative standard for asserting jurisdiction over such businesses—a gross of $50,000 or more per year from such operations—is fully satisfied based on the Company's receipt of $118,166.91 from Superior Shippers Association for its unloading and delivery services in connection with the goods coming to it directly from out-of-state. Accordingly, it is apparent that the Board properly applied its own standard in the present case.

The Company's contention that the standard was incorrectly applied here because the Company supplying the petitioner-Company with its business—Superior Shippers Association—is not itself subject to the Board's jurisdiction is without merit. The Company's argument is based on the erroneous view that jurisdiction was asserted here under the second alternative standard—performance of $50,000 worth of services for an enterprise over which the Board would assert jurisdiction. Although under that standard the Board would have to find Superior subject to its jurisdiction, *Kenilworth Delivery Service, Inc.*, 140 NLRB 1190, nonetheless,

as shown, jurisdiction here rests on the first alternative standard, not the second. Consequently, it is unnecessary to determine whether the facts here would permit application of the alternative standard.[6]

The Company's final suggestion (Br. p. 10) that the first alternative standard does or should take into consideration the volume of business done by each of the other "links" in the flow of the commerce is also groundless. Not only does the standard, by its terms, not depend on the amount of business performed by the other "links", but no sound reason appears why it should. The standard is specifically designed to cover entities directly involved in the movement of commodities in interstate commerce. The gross amount of revenue derived by any such entity from its services in connection with that movement is certainly a reasonable indication of the importance of that entity's contribution to the facilitation of the flow and a valid measure of its ultimate impact on the flow if a stoppage should occur at it. Further, a gross revenue of $50,000 or more from such an operation is hardly *de minimis*. *N.L.R.B. v. Jordan Bus Co., supra; N.L.R.B. v. Inglewood Park Cemetery Ass'n,* 355 F.2d 448, 451 (C.A. 9). Unlike chains, the strength or volume of the flow of interstate commerce is not determined by the size of each "link" associated with it. Consequently, the possibility that there may be other entities functioning as "links" in the same flow, which have grosses less than the amount specified in the standard and thus may make a proportionately smaller contribution to the flow, in no way detracts

[6]However, while not relevant to decision herein, it should be noted that the Company misreads *Mid-West Pool Car Ass'n, Inc.,* 114 NLRB 721, 722, the case on which it relies in support of its claim that the Board would not assert jurisdiction over Superior. In *Mid-West* the Board did not conclude, as the Company appears to say, that it would never assert jurisdiction over non-profit shippers' associations, but only over those not meeting the dollar standard. The record here contains insufficient evidence to determine whether Superior's dollar volume is enough to meet Board standards. In addition, many of the statements in the Company's brief relating to the precise nature of Superior's business are not supported by record evidence.

from or warrants disregarding the significance of the contribution of an entity, such as the present Company, which makes the prescribed gross.

II.

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY INTERROGATING EMPLOYEES AND MAKING COERCIVE THREATS AND PROMISES IN ORDER TO DEFEAT THE UNION

The credited evidence[7] establishes that almost immediately after Company President Moesh learned that the Union was seeking to organize petitioner's employees, he embarked upon an unlawful course of conduct to thwart the Union's efforts. Thus, he interrogated two job applicants, Phillips and Barth, in the course of employment interviews concerning their union sentiments; he offered or gave pay raises to Schacht, Phillips, Brewster and Barth if they would reject the Union; and he told Phillips, Barth and Brewster that he would shut down his business rather than accept a union, that he would lay employees off and sub-contract out their work if the Union won the election. It is settled that such conduct violates Section 8(a)(1) of the Act.[8] Moreover, after

[7]Petitioner offers no basis for setting aside the credibility findings of the Trial Examiner. As this Court only recently reiterated, such findings are entitled to "great weight" and "shouldn't be disturbed unless a clear preponderance of all of the relevant evidence convinces that they are incorrect." *N.L.R.B. v. Luisi Truck Lines*, 384 F.2d 842, 846; accord, *N.L.R.B. v. Gorlick et al*, 364 F.2d 508, 509 (C.A. 9).

[8]See, as to interrogation, *N.L.R.B. v. Ambrose Distributing Co.*, 358 F.2d 319, 320 (C.A. 9), cert. denied, 385 U.S. 838; *N.L.R.B. v. Security Plating Company*, 356 F.2d 725, 727 (C.A. 9); *N.L.R.B. v. West Coast Casket Co.*, 205 F.2d 902, 904-905 (C.A. 9); *N.L.R.B. v. Kolpin Bros. Co.*, 379 F.2d 488, 490 (C.A. 7); *N.L.R.B. v. Borden Co.*, __ F.2d __, 67 LRRM 2677, 2678 (C.A. 5). Cases such as *Wayside Press, Inc. v. N.L.R.B.*, 206 F.2d 862, 864 (C.A. 9), are not in point here for it is clear that the questioning occurred as part of a general pattern of anti-union activities committed by the Company. See, as

the election he deliberately imposed more onerous working conditions on Brewster and Barth because of their support of the Union and to induce them to quit. That his reason for so acting was a discriminatory one is clear. See *infra* pp. 16-18. Such conduct, therefore, is also violative.[9]

There is no merit to the Company's contention (Br. p. 11) that the pay increase given to Brewster was unimportant because it was Brewster who first suggested the idea. The fact remains that after Brewster's statement, Moesh sought him out on the day before the election and gave him the raise while indicating his firm opposition to the Union and making a promise of a similar benefit for Barth. In the Examiner's words, the payment was in the nature of a "bribe" (R. 16). Brewster's error in no way excuses Moesh's complicity, particularly since the other pay raises given and the reduction in pay after the election demonstrate that he was all too willing to raise or lower wages at any time under any circumstances for anti-union purposes. Since the raise was clearly hinged on the employee's vote in the election, it was violative. *N.L.R.B. v. Lowell Sun Publishing Co.*, 320 F.2d 835, 839 (C.A. 1). See also, *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409; *N.L.R.B. v. Laars Engineers, Inc.*, 332 F.2d 664, 666-667 (C.A. 9), cert. denied, 379 U.S. 930.

The Company's further argument that Moesh's statements "were in the nature of predictions and not threats" (Br. p. 11), permitted by Section 8(c) of the Act, has no substance. To be sure, the cases cited by petitioner, *N.L.R.B. v. Transport Clearing, Inc.*, 311 F.2d 519, 523 (C.A. 5) and *Texas Industries, Inc. v. N.L.R.B.*, 336 F.2d 128, 130 (C.A. 5)

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to promises and grants of benefits, *N.L.R.B. v. Luisi Truck Lines*, 384 F.2d 842, 845 (C.A. 9); *N.L.R.B. v. Security Plating Company, supra.* See, as to the threats to close the business and subcontract the work, *N.L.R.B. v. V.C. Britton Co.*, 352 F.2d 797, 798 (C.A. 9); *N.L.R.B. v. Kit Manufacturing Co.*, 292 F.2d 686, 688, 690 (C.A. 9).

[9] *N.L.R.B. v. Victory Plating Works, Inc.*, 325 F.2d 92, 93 (C.A. 9), enforcing 140 NLRB 389, 393; *N.L.R.B. v. Rutter-Rex Mfg. Co.*, 229 F.2d 816, 818 (C.A. 5).

hold that a "prediction that competitive conditions will force a plant to close if a union contract is signed is protected." But they also state that "a threat to close down in retaliation to unionization is beyond the pale."[10] Here, petitioner contends that "what Moesh stated was that Publix must continue to be competitive and if it was not competitive, Superior would take its business elsewhere . . . ." (Petitioner's brief, p. 12). However, insofar as Moesh may have testified to this effect, the Board did not credit it. Rather, the Board credited express testimony that Moesh told Phillips in August 1966 that "he would close the warehouse down before he would go union" (p. 4, *supra*); and, further, that Moesh separately told Barth and Brewster on the day before the election that he would "start contracting work out to Sea Land" if the Union won (p. 5, *supra*). Moreover, there is supporting evidence in the record that Moesh indicated to employees that he would take the threatened action, not because the Union would force him to do so or economic conditions resulting from unionization would compel such action, but rather "as a matter of principle" (*N.L.R.B. v. V.C. Britton Co., supra* at p. 798) and because of his distaste for collective bargaining. Thus, he informed Schacht at the start of the Union's campaign, ". . . I'll pay you more money, but I want to run my own business" (R. 15; Tr. 83). Additionally, he told Phillips when the latter

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[10]Thus, in *Transport Clearing, Inc.*, a supervisory official told one employee that "the employer might close if the employees went union," and told another employee that "there would be twenty-odd women walking the streets looking for jobs if the union came in because the doors would be closed tight." 311 F.2d at p. 521. The court found these statements to be coercive. On the other hand, the court refused to enforce that portion of the Board's order based "on evidence to the effect that the general manager stated that respondent, a cooperative non-profit organization representing freight motor carrier members, might be forced out of business if the motor carriers had to pay the company the same amount to operate as it would cost them to collect their own bills." 311 F.2d at p. 523.

was hired that "he paid union wages there but he did not want to go union" (p. 4, *supra*). And at a later date, when Moesh made the statement referred to above, about closing the warehouse, it was in response to a comment by Phillips that Moesh "would make money even if he was to go union" (*supra*, p. 4). Significantly, Moesh did not disabuse Phillips of this notion, but said that "he absolutely didn't want anything to do with the union affiliation" (*supra*, p. 4). In these circumstances, we submit that the Board was fully jusitified in concluding that Moesh's statements concerning a shutdown of the warehouse or subcontracting of work would reasonably tend to coerce employees and therefore violated Section 8(a)(1) of the Act. *N.L.R.B. v. Ambrose Distributing Co., supra; N.L.R.B. v. V.C. Britton, supra; N.L.R.B. v. Transport Clearing, Inc., supra;* Cf. *N.L.R.B. v. Miller,* 341 F.2d 870, 873 (C.A. 2); *N.L.R.B. v. W.C. Nabors Co.*, 196 F.2d 272, 276 (C.A. 5), cert. denied, 344 U.S. 865.[11]

Finally, the Company's contention that "the decision of the Trial Examiner dwells on facts and activities which took place over an extensive period of time well in excess of that complained of in the complaint" (Br. pp. 10-11), raises an immaterial issue. The "facts and activities" which the Company refers to all related to the Company's response to the Union's organizing drive and were part of a pattern of unlawful conduct. At the very least, they could be properly considered by the Board to show that the Company was engaged in a sustained effort to defeat the Union through illegal means and that subsequent events within the complaint period were not isolated incidents. The Company did not

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[11] This Court's recent decision in *N.L.R.B. v. TRW Semi-Conductors*, 385 F.2d 753, not only does not require a different result, but indeed tends to support the result reached herein. For the statements here, unlike those in *TRW* which the Court held to be privileged predictions because they related to events over which the employer has no control, clearly constitute "a threat of action which the employer can impose or control" (385 F.2d at 758) and which therefore are not privileged.

claim at the hearing and does not now assert that it was surprised by the evidence introduced by the Board or that it did not have full opportunity to litigate whatever matters were placed in issue by that evidence.

In any event, the only conduct here outside the complaint period—the raise for Schacht in May and the interrogation of Phillips in June—was exactly duplicated by other raises to other employees and the interrogation of Barth within the period. Therefore, even if these findings were disregarded, no modification of the Board's order would result, since the other findings based on the identical conduct within the period by themselves fully support the order.

III.

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY THE LAYOFF OF BARTH AND THE GENERAL CUTBACK IN HOURS AND WAGES

The undisputed facts show that, following the Union's election victory, the Company laid off employee Barth for two and a half weeks and reduced the weekly hours of work of other employees from 47½ hours to 40 hours; their weekly pay was diminished accordingly. The law is settled that such actions on the part of an employer are violative of Section 8(a)(3) and (1) of the Act if the employer were motivated by anti-union considerations. E.g. *N.L.R.B. v. Guild Industries*, 321 F.2d 108, 110-112 (C.A. 5); *Trumbull Asphalt Co. v. N.L.R.B.*, 314 F.2d 382, 383 (C.A. 7), cert. denied, 374 U.S. 808; cf. *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 227-228; *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F.2d 466, 468-470 (C.A. 9).

On that score the record leaves no doubt. For, although "[d]irect evidence of a purpose to discriminate is rarely obtained" (*Corrie Corp. v. N.L.R.B.*, 375 F.2d 149, 152 (C.A. 4)), this is one of those unusual cases in which such

decisive evidence is present. Thus, according to the credited testimony of Phillips, Moesh told Phillips not only that he was "highly disgusted with the election results," but also what he intended to do about the matter. The events that transpired thereafter—the layoff of Barth, the reduction in hours and wages, plus the onerous working conditions imposed on Brewster and Barth (see *supra*, pp. 6, 12-13—were all part of the plan unfolded beforehand to Phillips by Moesh. The object, as Moesh explained to Phillips, was to induce the pro-union employees to leave (*supra*, p. 6). Once the words attributed to Moesh "are credited as having been said, their form and context and content eliminate all doubt on motive." *N.L.R.B. v. Ferguson*, 257 F.2d 88, 90 (C.A. 5). In short, Moesh's remarks to Phillips constituted "an outright confession of unlawful discrimination" (id. at p. 92), in which Moesh revealed in detail his intention to exact retribution against the employees for their vote for the Union and to induce them to quit so that the Union's support would be undermined.

The Company's assertions that the layoff of Barth and the reduction in the hours of other employees were the result of legitimate business considerations fail to withstand scrutiny. Specifically, Moesh's testimony that work was slack when Barth was laid off and therefore he had no need for Barth's services is scarcely plausible in view of the fact that Phillips was on "extended overtime" and worked sixty hours during the first week of Barth's layoff (R. 17; Tr. 68). Nor was Deegan's testimony that the Company experienced "a low period" after the election particularly persuasive. For while Deegan said that the Company "only had six cars a week for a period of six weeks," he failed to state how this differed from the number of cars the Company normally handled (Tr. 94). Equally dubious was the contention, "rather vaguely raised" by Moesh, "that the cut in hours was necessitated because the Union would have required overtime rates in excess of those the [Company] was able to pay . . ." (R. 17). Moesh had previously told Phillips that he was already paying "union wages," and in any event

did not discuss with the Union what wage rates the Union might be willing to accept (R. 17; Tr. 62).

In sum, in view of Moesh's "outright confession of unlawful discrimination" and petitioner's unconvincing explanation for its actions, the evidence supporting the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act is not only substantial, but indeed virtually conclusive.

IV.

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REDUCING HOURS AND WAGES WITHOUT BARGAINING WITH THE UNION ABOUT THE MATTER

Immediately following the election, the Union representative asked the Company to bargain. Despite this request, it is undisputed that the Company thereafter reduced hours and wages unilaterally and without prior consultation with the Union. That there was a real cut in hours rather than a reversion to a "normal work week of forty hours" (Br. p. 15) is clear. Thus, with respect to the number of hours the employees worked prior to the election, Moesh acknowledged, "I guaranteed so much a week whether they had freight or not" (Tr. 29). After the election, however, the situation changed—the hours and consequently the weekly pay of the employees were reduced—because, as Moesh further testified, "[i]f it was going to go union, you can't guarantee so much if you don't have any freight" (Tr. 29).

Section 8(a)(5) of the Act requires an employer to notify and bargain with the statutory representative of his employees, about significant changes in employees' working conditions before putting such proposed changes into effect. Plainly, a change in employees' hours—one of the subjects expressly mentioned in the statute—is a bargainable matter, *Weston and Brooker Company*, 154 NLRB 747, 763, enf. 373 F.2d 741 (C.A. 4), and the Company's action here,

taken without any discussion with the Union, was therefore violative. See *N.L.R.B. v. Johnson*, 368 F.2d 549, 551 (C.A. 9); *N.L.R.B. v. Yutana Barge Lines, Inc.*, 315 F.2d 524, 529-530 (C.A. 9); *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 208, 209-214; *N.L.R.B. v. Katz*, 369 U.S. 736, 742-743. The possibility suggested in the Company's brief, p. 14, that the Company acted at the employees' request is immaterial. The Company's obligation is to deal with the Union exclusively. *Medo Photo Corp. v. N.L.R.B.*, 321 U.S. 678, 683-684.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a decree should issue denying the petition to review and enforcing the Board's order in full.

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CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18, 19 and 39 of this Court and in his opinion the tendered brief conforms to all requirements.

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NATIONAL LABOR RELATIONS BOARD

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151 *et seq.*) are as follows:

Sec. 2(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory of the District of Columbia or any foreign country.

Sec. 2(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

* * * * *

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative

action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken . . . and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief

sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considas a whole shall in like manner be conclusive.